United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 75-4202

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ZIM TEXTILE CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by offering benefits to employees on the condition that they withdraw support from the Union, and by coercively interrogating employees concerning their support for the Union.

2. Whether, in light of the foregoing unfair labor practices, and the discriminatory discharge of Israel Colon and Nelson Vega, Jr., admitted by the Company to be violative of Sections 8(a)(3) and (1) of the Act, the Board properly ordered the Company to bargain with the Union.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against Zim Textile Corp. ("the Company"), on June 6, 1975. The Board's decision and order are reported at 218 NLRB No. 46 (A. 48-55).[1] This Court has jurisdiction of the proceedings under Section 10(e) of the Act, the unfair labor practices having occurred in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is engaged in selling towels and bed linens to retailers in the New York City metropolitan area. The Company maintains its offices and warehouse at 6-10 East 32nd Street, New York, New York. Morris Zimbach is its sole owner and president; he is about seventy years old and, at the time of the events in question, devoted only about 20 or 30 per cent of his time to the business, only half of that on the premises. His two sons-in-law, Jerome Mockson and Martin Zell, are in direct charge of operations: Mockson devotes his entire time to selling

[1] "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

and Zell supervises the work of the office and the warehouse (A. 5; 129-130). In the first few months of 1974,[2] the Company had three employees. Israel Colon and Nelson Vega, Jr. were employed as warehousemen or shipping clerks. Rosalinda Balmeo served as a bookkeeper and office employee (A. 6-7).

In November or December 1973, Colon's wife became enrolled in a training program and she and their children lost their eligibility for public medical assistance. Colon told Zell about the development and asked whether some sort of medical insurance could be given to him in connection with his employment. Zell indicated that he was unable to grant the request at that time (A. 7, 12-13; 96-98, 106-107, 130-131).

B. The Employees Authorize a Union to Represent Them

In January 1974, warehousemen Colon and Vega decided to contact a union delegate (A. 112) which Colon did (A. 98). On February 7, the two warehousemen signed membership cards, authorizing the Union[3] to bargain for them (A. 7; 71, 98-101, 112-113).

Organizers for the Union, Ralph Passman and Edward Pagan, visited the Company's offices twice in March, speaking to Zell each time. The first time, around March 15, Passman said that the Union represented the employees and asked to speak to the president of the Company. Zell replied that he was away; Passman left his card and requested that the president contact him (A. 13-14; 101, 132). On the second visit, March

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[2] Unless otherwise indicated, all dates hereafter refer to 1974.

[3] District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America.

28, the Union organizers again told Zell that the Union represented the Company's employees. Zell once again said that the Company president was away. As the organizers left, Passman said, "I see that we are going to have to file." (A. 7, 14; 119-120, 133.)

C. The Company Offers Benefits to Induce Abandonment of the Union

Immediately after the Union agents left the Company's office on March 28, Zell asked Colon for an explanation of the organizers' visit. Colon said that he and Vega wanted the medical and other benefits that could be obtained through the Union (A. 7; 77-78, 102-103, 134-135, 144). As a substitute, Zell offered certain pension and health insurance benefits. Zell asked Colon to discuss this proposal with his wife and with Vega and told Colon, if they decided they did not want a union, to go down to the union and tell them so. (A. 15; 109, 135.) Colon told Zell: "If you can get me these things, I don't need the Union" (A. 7; 103).

The following morning, Friday, March 29, Colon conveyed to Vega, as requested by Zell, the message that Zell had offered health and other benefits as an alternative to the Union (A. 7; 108-109, 117, 135, 147). After the employees had discussed Zell's proposal for half an hour or so, Zell came in and told them if they had decided against the Union, to go down and "tell the Union that they wanted out" (A. 16; 148, 135). The employees agreed to take several hours at lunch to go to the Union office; Zell believed their purpose was to withdraw their applications for membership and to have the Union withdraw the filing alluded to by Union Organizer Passman the previous day (A. 7-8; 109, 117-118, 135). According to Zell, Colon said, on his return, "Don't worry, it is taken care of" (A. 8; 136).

The following Monday, April 1, contrary to Zell's expectations, there was no letter in the mail announcing the union's withdrawal. Zell asked Colon about this, but Colon evaded answering (A. 8; 137). Thereupon Zell telephoned Passman; when Passman returned his call, Zell had Colon and Vega pick up extension telephones in other parts of the premises. Zell announced that the workers had changed their minds about wanting a union and asked why he had not received any letter by the Union acknowledging this. Passman responded that it was too late to stop the filing and that if the employees did not want union representation, they could vote "no". (A. 8; 118-119, 120-122, 137-138.)

D. The Company Coercively Interrogates Colon and Vega and Discharges Them for Their Continued Support for the Union

On Thursday morning, April 4, the Company received a letter from the Board's Regional Director enclosing a copy of the Union's representation petition, which was filed April 3 (A. 8; 72, 138-139). The petition described the appropriate unit for bargaining as "shipping — receiving — stock — office production & maintenance" and stated that there were three employees in that unit (A. 8; 72). Zell then telephoned the Board's Regional Office and spoke with the Regional Director, who declined to advise Zell but suggested that, before getting into "any problems," he consult an attorney. Zell had not anticipated retaining counsel for an election but was informed that the matter was "a little bit more involved than that." (A. 8; 139-140).

Vega reported for work later that morning (April 4) and went to the lavatory to change his clothes. When Colon subsequently came in, Zell

showed him the representation petition and pointed out that the petition had been filed only the previous day, despite his understanding that it had been "straightened out" (A. 8-9, 50; 103-104, 140). He complained of the need to retain an attorney at a cost of "thousands of dollars." Zell had "raised his voice" in anger, yelling at Colon, who slammed his palm down onto the desk and said, "I want the Union". (A. 9, 51; 104, 140.) Zell asked "You mean you want a union here?" (A. 140). When Colon said he did, Zell answered, "If you want the Union, you are fired" (A. 9, 51; 104, 141). Zell then yelled out to Vega, who was still in the lavatory, "Nelson do you want the Union?" Vega responded, "Yes, I do want the Union." Zell said, "Well then, you are fired too; get out." (A. 9, 51; 79, 114, 141). The two men pointed out that they had been fired and were not quitting voluntarily, then left (A. 9; 104, 115).

Colon and Vega then went to the Union office and returned later that morning with organizers Passman and Pagan. Passman requested the men's reinstatement, to which Zell responded that "it is out of my hands" and that he would "see [Passman] in front of the National Labor Relations Board." (A. 9; 105, 115, 122, 141.)

That afternoon (April 4) the Company retained counsel, at whose suggestion Zell telephoned Passman to say that he had reconsidered and would take Colon and Vega back (A. 9; 122-123, 141-142). The next morning, Friday, April 5, around eleven o'clock, the two employees came by to pick up their paychecks for what they thought was their final week. Pagan met them on the street and informed them that, on the advice of the Company's lawyer, they could go back to work (A. 116). Their paychecks for that week contained their full weekly pay (A. 9, 51; 105-106, 115-116, 142).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by offering medical and pension benefits to employees on the condition that they withdraw support from the Union and by coercively interrogating employees Colon and Vega concerning their support for the Union.[4] The Board also found that the Company violated Sections 8(a)(3) and (1) of the Act by discharging employees Colon and Vega for their Union support (A. 51-52, 16, 17, 30-31).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any other manner interfering with, restraining, or coercing employees in the exercise of their" rights under Section 7 of the Act. Affirmatively, the order requires the Company to bargain upon request with the Union for an appropriate unit of its employees,[5] to embody any understanding reached in a signed agreement, and to post appropriate notices (A. 52-53, 31-33).

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[4] Member Fanning, disagreeing with the Board majority, would find that the two employees' affirmative responses to the Company's April 4 interrogation on union support created a duty to bargain and that the Company's refusal to bargain with the Union after that date violated Section 8(a)(5) and (1) of the Act (A. 50 n. 3, 50-51, 17-19).

[5] In accord with its decision in *Steel-Fab, Inc.*, 212 NLRB No. 25, 86 LRRM 1474 (1974), the Board here (Member Fanning dissenting) entered the bargaining order solely as a remedy for the Section 8(a)(1) and (3) violations found and deleted the Administrative Law Judge's finding that the Company's refusal to bargain violated Section 8(a)(5) of the Act (A. 52 n. 6). In a subsequent decision, the Board has indicated that it may find a violation of Section 8(a)(5) in cases similar to this one. *Trading Port, Inc.*, 216 NLRB No. 76, 89 LRRM 1565 (1975). However, under that decision, the test for issuing a bargaining order remains the same: whether the employer's unfair labor practices have tended to impair the election process or undermine the union's majority. *Trading Port, Inc., supra,* 89 LRRM at 1569. The modification in rationale thus does not affect the validity of the Board's affirmative bargaining order in the instant case.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY OFFERING BENEFITS TO EMPLOYEES ON THE CONDITION THAT THEY WITHDRAW SUPPORT FROM THE UNION, AND BY COERCIVELY INTERROGATING EMPLOYEES CONCERNING THEIR SUPPORT FOR THE UNION.

As shown in the Statement of Facts, the second visit of Union organizers on March 28 led to a swift and coercive reaction from the Company. On that day Company official Zell queried employee Colon about the Union organizers' visit, learned that the employees were interested in securing medical and other benefits through union representation, and offered a substitute package of benefits to induce the employees to withdraw support from the Union. When Zell realized on April 4 that his proposal had not produced the desired abandonment of the Union, he angrily interrogated employees Colon and Vega about their continued interest in union representation, elicited their statements of support for the Union, and discharged them on the spot for that support (*supra*, pp. 3-6). The Board properly found that the Company's March 28-29 offer of benefits and its April 4 coercive interrogations impaired the free exercise of organizational rights, in violation of Section 8(a)(1).[6]

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[6] The Company has admitted before the Board that its April 4 discharge of Colon and Vega violated Section 8(a)(3) and (1) of the Act (A. 17, 51 n. 4; 42, 95). There is thus no question before the Court as to the propriety of the Board's Section 8(a)(3) and (1) findings of discriminatory discharges. These findings are relevant to the validity of the Board's bargaining order remedy, *infra*, pp. 13-19.

A. The Offer of Benefits Conditioned on Abandoning the Union

There is no question that the National Labor Relations Act guarantees the "right of employees to organize for mutual aid without employer interference," *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798 (1945). An offer of benefits made contingent upon the employees' rejection of union representation constitutes a clear and direct interference with organizational rights. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 686 (1944) ("There could be no more obvious way of interfering with these [Section 7] rights of employees than by grants of wage increases upon the understanding that they would leave the union in return."); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180-181 (C.A. 2, 1962), cert. denied, 370 U.S. 919.

In the instant case, the Company clearly made a promise of benefits that was expressly conditioned on employee rejection of the Union. As noted above, Zell's March 28 offer of benefits was a response to employee Colon's statement that he and Vega wanted the medical and other benefits that could be obtained through the Union (A. 7; 77-78, 102-103, 134-135). Zell and Colon both testified that the benefits were put forward as an express alternative to those obtained through the Union and were coupled with a request that the Union be abandoned if the Company's plan seemed preferable (A. 7-8, 16; 103, 134-135). The request to abandon the Union was renewed the following day when Zell suggested that the employees, after considering his proposal, inform the Union that they "wanted out" (*supra*, p. 4). In short, the clear import of Zell's March 28-29 conduct was that the health

and pension benefits were offered on the understanding that the employees reject the Union representation.[7] Under the cases cited above, such an offer of benefits was plainly unlawful.

Before the Board the Company argued that the benefits offered on March 28 were not aimed at undercutting employee support for the Union, but were merely the implementation of a promise Zell had made to Colon in December 1973. However, Zell's own testimony shows that the December conversation covered at most a promise to Colon of hospitalization benefits (A. 130-131), which Colon recalled as a promise to *try* to get him into the Company plan, contingent on the approval of Company owner Zimbach (A. 97, 107). Either version falls far short of the March 28 proposal, which extended to Vega as well as Colon, covered pensions as well as medical benefits, and perhaps even more significantly, included an offer of future cooperation and understanding implied in a request to "go along with me" (A. 135, 149). Cf. *N.L.R.B. v. Yokell*, 387 F.2d 751, 755 (C.A. 2, 1967); *N.L.R.B. v. Rollins Telecasting, Inc.*, 494 F.2d 80, 83-84 (C.A. 2, 1974), cert. denied, 419 U.S. 964 (suddenly-compliant employer attitude, where accompanied by actual promises of benefit, violates Section 8(a)(1)). Finally, and most importantly, the March 28 offer was found to have been expressly conditioned on the employees' "forget[ting] about the union" (A. 51, 16; 103). It is thus apparent that the March 28 proposal was not based on any prior

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[7] The situation here is thus similar to that presented in *N.L.R.B. v. Philamon Laboratories, Inc., supra*, 298 F.2d at 180-181 where the employer ". . . was quite anxious to discover why the employees wanted a union, or, to put it another way, how much it would cost him to get rid of the union. Having learned the price, he then met it".

commitment but rather was specifically devised to counteract the employees' interest in the Union.[8]

B. The Coercive Interrogation on Continued Support for the Union

As noted above, the apparent acceptance by Colon and Vega of his promise of benefits led Zell to believe that they would reject the Union and that they had, at Zell's suggestion, gone to the Union office on March 29 for the purpose of having the Union withdraw its interest in representing the employees (A. 7-8; 135, 149). Zell became concerned when, on April 1, he did not receive the expected letter of withdrawal from the Union. He first asked Colon about this and, on getting an evasive reply, called Union organizer Passman. With Colon and Vega

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[8] Before the Board, the Company attacked the Administrative Law Judge's granting of General Counsel's motion, made at the close of the hearing, to amend the complaint to include the charge that the Company's March 28 offer of benefits violated Section 8(a)(1) of the Act. This Court has held such amendments at the hearing proper where, as here, the "issue was fully litigated at the hearing and there was no showing of surprise which may have hampered presentation of respondent's defense on this aspect of the case." *N.L.R.B. v. Roure – Dupont Mfg. Co.*, 199 F.2d 631, 633 (C.A. 2, 1952). Cf. *N.L.R.B. v. Yale & Towne Mfg. Co.*, 114 F.2d 376, 379 (C.A. 2, 1940). Here, the Company was unable to show how it was surprised or prejudiced by the amendment (A. 15-16; 152-154). Indeed, it could hardly do so, inasmuch as the March 28 offer of benefits, found by the Board to be coercive, was originally pleaded by the Company in its Answer as an affirmative defense (A. 68 at Par. 14). The Company thus understood the issue at the time it was litigated and cannot be heard to complain when the Board decides this material, fully-litigated issue. See, *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350 (1938); *American Boiler Mfrs. Assn. v. N.L.R.B.*, 404 F.2d 547, 556 (C.A. 8, 1968), cert. denied, 398 U.S. 960.

listening on extension phones, Zell told Passman that the employees did not want the Union and asked why the withdrawal letter had not arrived.[9]

The arrival on April 4 of the Regional Director's letter and Union's representation petition (A. 72) shattered Zell's expectations. He confronted Colon with the documents, showing him that the petition had been filed on April 3, contrary to his understanding that the employees would "straighten out" the matter (A. 8-9, 50; 103-104, 140). Zell then angrily and loudly protested the continued Union activity, questioned Colon on his continued support for the Union, and, on hearing Colon's declaration of support, bluntly stated "If you want the Union, you are fired." Zell next shouted to Vega, "Nelson, do you want the Union?" and, when Vega indicated "yes", Zell announced: "Well then, you are fired, too; get out" (A. 9, 51; 79, 114, 141). This rapid-fire and hostile exchange clearly indicates that the Company was probing employee attitudes on the Union in order to take instant retaliatory action.

This Court has held that interrogating employees concerning their union sympathies may itself threaten, hence coerce, them, where, *e.g.*, the interrogation is "calculated to frustrate the union's organization campaign by instilling fear of reprisals in the employees." *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966). See also *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85, 94 (C.A. 2, 1971). The immediate discharge of the interrogated employee provides strong evidence of the threatening nature of the interrogation. *N.L.R.B. v. George Roberts &*

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[9] While not alleged to be unfair labor practices, Zell's requesting the employees to inform the Union they no longer wanted the union representation and his requiring them to listen to his appeal to Passman for withdrawal clearly created added pressure on the two employees to repudiate their support for the Union (A. 16, 28).

Sons, Inc., 451 F.2d 941, 946 n. * (C.A. 2, 1971); *Great Eastern Color Lithographic Corp.*, 133 NLRB 911, 918-919 (1961), enforced 309 F.2d 352 (C.A. 2, 1962), cert. denied, 373 U.S. 950; *N.L.R.B. v. Armstrong Circuit, Inc.*, 462 F.2d 355, 357 (C.A. 6, 1972). The evidence outlined above indicates that Zell's April 4 harangue of employees Colon and Vega did convey a clear threat of reprisal for their union activity. Thus, while not extensive, Zell's questioning focused on the critical factor — did the employees want the Union — elicited their support for the Union, and was followed immediately by the discharge of the two employees for that support.[10] In these circumstances, the Board reasonably found that Zell's interrogations were in themselves threatening and thus violative of Section 8(a)(1) of the Act.[11]

II. THE BOARD PROPERLY ORDERED THE COMPANY TO BARGAIN WITH THE UNION.

There is no dispute that the Union possessed valid authorization cards from employees Colon and Vega and thus represented on April 4,

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[10] The Company has admitted that the discharges violated Sections 8(a)(3) and (1) of the Act (A. 12, 17, 51; 42, 69).

[11] The interrogations would also qualify as coercive under this Court's criteria for questioning not itself threatening. *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964). Thus, Zell's April 4 angry interrogation of the employees followed a week of Company pressure to repudiate the Union; it sought information directly used for discriminatory action against the employees; and the questioner was the effective manager of the warehouse operations. (*Supra*, pp. 3-6). Thus, even if found "not itself threatening", the interrogation would meet a sufficient number of the *Bourne* tests to establish the violation. See, *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972); *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970); *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2, 1967); *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-133 (C.A. 2, 1970).

1974, a majority of the Company's employees. Nor is there any question that the shipping-stock-clerical employees constitute an appropriate unit for bargaining (A. 53, 10; 89-90, 93).[12]

Thus, the sole remaining issue before the Court is whether the Board could reasonably find that the Company's unfair labor practices, found by the Board or admitted by the Company, so impaired the election process as to warrant an order to bargain based on the authorization cards signed by Colon and Vega.[13] That such an order may appropriately

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[12] While conceding the appropriateness of the unit, the Company at times contended before the Board that the clerical employee was entitled to a "self-determination" election to decide whether she wishes to be part of the unit (A. 19 n. 14). That contention is wholly without merit. The Board's self-determination or "Globe" election (originating in *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937)) is a procedure for resolving certain unit questions in representation proceedings; it is not applicable to unfair labor practices cases where employer unlawful conduct has already impaired the election process. Moreover, it is designed to permit a minority group of unrepresented employees, which has interests differing from the majority's and which is itself an appropriate unit, to decide whether to be represented separately or to be included in a larger grouping. Here, in the first place, there has been no showing whatever by the Company that the interests of the clerical employee differ from those of the other employees. Second, even assuming such independent interests, the Board, which does not recognize one-person bargaining units, will include a single employee in a broader unit rather than leave the employee unrepresented. *Standard Brands Incorporated*, 175 NLRB 734, 735 n. 10 (1969). Third, the Company has conceded that the larger unit is appropriate (A. 53, 10; 89-90, 93). There is thus no basis for applying *Globe* here, even if a representation proceeding were before the Court in this case.

[13] The fact that the Union participated in the representation proceedings after the commission of the unfair labor practices in this case (A. 73-76, 80-81) does not constitute a "waiver" or negate the appropriateness of the Board's bargaining order. Under established Board practice, there is no inconsistency in pursuing the election route and later charging unfair labor practices; and the union's litigation strategy does not limit the Board's power to remedy employer election interference and effectuate employee rights. *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), cited with approval, *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 615 n. 34 (1969). Cf. *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 n. 6 (C.A. 2, 1965).

issue in cases where unfair labor practices "interfere with the election process and tend to preclude the holding of a fair election" was, of course, the holding in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969). The Supreme Court there indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that such an order is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614. It is well settled, as this Court has noted, that "the determination of whether unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the Courts." *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973). Accord: *N.L.R.B. v. Hendel Mfg. Co.*, 483 F.2d 350, 352-353 (C.A. 2, 1973); *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907 ("Appellant's attack on the use of a bargaining order must fail, moreover, in light of the Supreme Court's decision in [*Gissel*], entrusting to the Board almost total discretion to determine when a bargaining order is appropriate"); *Donovan v. N.L.R.B.*, 520 F.2d 1316, 1322-1323 (C.A. 2, 1975).

The Board's assessment that a bargaining order was warranted here is amply justified by the record in this case, which discloses a week of

pressure on employees to repudiate the union. The Company first sought to determine why its employees wanted the Union, then offered benefits as a substitute for Union representation and conditioned on repudiating the Union. This was followed by additional pressure in the form of a request to employees to withdraw their Union membership, and a required audition of the Company's request to the Union that it withdraw. Finally, upon the arrival of the representation petition, came the angry interrogation which uncovered the employees' continued adherence to the Union and led to their immediate discharge (*supra*, pp. 4-6).

In short, the Company employed the effective approach of "the carrot and the stick" (*N.L.R.B. v. Yokell*, 387 F.2d 751, 757 (C.A. 2, 1967)) in order to induce employee disaffection from the Union. The apparent lack of success of the "carrot" of special benefits led to the heavy "stick" of the discharge of the pro-union employees. The combined effect of these unfair labor practices culminating in discriminatory discharges clearly operated to preclude a fair election. For it is well recognized that "[t]hreats of . . . job loss in the event of the Union's advent are plainly actions which in and of themselves are egregious enough" to warrant a bargaining order under *Gissel. Milgo Industrial, Inc.*, 203 NLRB 1196, 1200-1201 (1973), enforced 497 F.2d 919 (C.A. 2, 1974). See also, *N.L.R.B. v. Gissel Packing Co., supra*, 395 U.S. at 611 n. 31. Here, however, the Company took its coercive conduct beyond a threat to the on-the-spot implementation of reprisals for union support. It is well recognized that the "surest method of undermining a union's majority or impeding an election process is to discharge all the pro-union employees . . ." *N.L.R.B. v. Sitton Tank Co.*, 467 F.2d 1371, 1372 (C.A. 8, 1972). This Court has enforced orders to bargain based on

similar findings of coercive and discriminatory action tending to undermine majority strength and impede the election processes. See, e.g., *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 938 (C.A. 2, 1970) (general threats of plant closure, promises of benefits and persuasion to form a separate union); *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872-873 (C.A. 2, 1970), cert. denied 402 U.S. 907 (1972) (unilateral wage increases, threats of plant closure, and persuasion to form a grievance committee to bypass the union); *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1293 (C.A. 2, 1972) (interrogation, threats of discharge and promise of benefits).[14]

The Company contended before the Board that its prompt reinstatement of those discriminatorily discharged, with no loss of pay, renders the order to bargain improper and, in effect, restores the possibility of a fair election. The Board could reasonably find that the impact of the unlawful discharges was not so easily erased and that an "employer's willingness to employ extreme measures to defeat a union cannot help but have a lasting and telling effect. Employees will certainly understand and remember the harsh treatment visited on them as a result of asserting their rights and may draw back from again asserting those rights. A free and fair election in these circumstances is unlikely." (A.

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[14] The propriety of the bargaining order is not diminished by the fact that, since the unfair labor practices described above, Nelson Vega, Jr. has been permanently laid off for what the Board found were legitimate economic reasons (A. 48-50). There was a valid Union majority prior to the Company's unfair labor practices, and the Board is authorized to effectuate employee sentiment by restoring the *status quo ante* the Company's unlawful conduct. *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 705 (1944); *N.L.R.B. v. Gissel Packing Co., supra*, 395 U.S. at 612.

52).[15] In similar situations, the Board, with court approval, has found reinstatement of discharged employees no defense to a bargaining order, where the coercive effect of such discharge is unlikely to be easily dissolved. See, e.g., *Levi Strauss & Co.*, 180 NLRB 415 (1969), *enforced sub nom., Southwest Regional Joint Board, Amalgamated Clothing Workers of America v. N.L.R.B.*, 441 F.2d 1027 (C.A.D.C., 1970); *Joseph I. Lachniet*, 201 NLRB 855 (1973), *enforced* 490 F.2d 1382 (C.A. 6, 1974); *Vernon Devices, Inc.*, 215 NLRB No. 62, 88 LRRM 1299 (1974); *E.S. Merriman & Sons*, 219 NLRB No. 114, 90 LRRM 1161, 1163 (1975); *Unaflex Rubber Corporation*, 216 NLRB No. 102, 89 LRRM 1269 (1975).[16] The Company here has demonstrated both its strong anti-union sentiment and its willingness to go past the brink of the law to effectuate its wishes.[17] Particularly in a "small, closely-knit unit," *N.L.R.B. v. Scoler's, Inc., supra*, 466 F.2d at 1293, the Board reasonably found that the impact of the Company's illegal conduct was telling and unlikely to be soon forgotten (A. 52).

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[15] The Company's suggestion that the events of April 4-5 increased the apparent potency of the Union is fanciful. The employees were aware that their reinstatement was a function of the potency, not of their Union, but of the law (A. 116).

[16] See especially the opinion of the Administrative Law Judge in *Unaflex Rubber Corporation*, 216 NLRB No. 102 at 6 (slip opinion); "I am not satisfied that the coercive effects of the original spontaneous conduct reflecting the natural feelings of an employer are necessarily dissipated by subsequent statements made and action taken after consulting counsel."

[17] Before the Board, the Company suggested that its interrogations, as well as its discriminatory discharges, were mitigated or excused because of Zell's "naivete and inexperience" in union matters (A. 17 n. 10; 43). It is apparent that Zell's naivete manifested itself only in a lack of knowledge as to what the law forbids. There can be no dispute respecting the sincerity with which Zell's anti-union beliefs were held and the vigor with which they were turned against employees.

CONCLUSION

For the reasons stated, it is respectfully submitted that judgment should issue enforcing the Board's order in full.

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December, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 75-4202
	)	
ZIM TEXTILE CORP.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Elliott Moore

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 12th day of December, 1975.